LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
DEC 3 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-789

DONALD R. McGEE,

Petitioner,

—v.—

BURLINGTON NORTHERN, INC., a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

JOHN C. HOYT
Attorney for Petitioner
320 First Avenue North
P.O. Box 2807
Great Falls, Montana 59403
Tel. (406) 761-1960

INDEX

PAGE

Citation to Opinions Below 1

Jurisdiction 2

Question Presented 2

Constitutional Provision Involved 2

Statement of the Case 2
A. Facts 4

Reasons for Granting the Writ 7

Argument 8
1. Law of Montana 9
2. Due Process Denied 11

Conclusion 13

Appendix A: Order and Opinion of the Montana Supreme Court Dated August 18, 1975 ..... A-1

Appendix B: Order to Show Cause of Montana Supreme Court Dated December 17, 1974 ..... B-1

Appendix C: Order of Montana Supreme Court Dated January 21, 1974 Denying Defense of Contributory Negligence C-1

Appendix D: Order Denying Petition for Rehearing D-1

TABLE OF AUTHORITIES

Cases: PAGE

Barkley v. Tieleke (1876) 2 Mont 433 9

Buchalter v. New York (1943) 319 US 427, 87 L ed 1492, 63 S Ct 1129 12

Cafeteria and Restaurant Workers Union v. McElroy (1961) 367 US 886, 6 L ed 2d 1230, 81 S Ct 1743 12

Carlson v. Northern P. Ry. Co. (1929) 86 Mont 78, 281 P 913 9

Creighton v. Herschfield (1874) 2 Mont 169 9

Davenport v. Kleinschmidt (1889) 8 Mont 467, 20 P 823 9

Dent v. West Virginia (1888) 129 US 114, 32 L ed 623, 9 S Ct 231 12

Dunseth v. Butte Electric Ry. Co. (1910) 41 Mont 14, 108 P 567 9

First National Bank of White Sulphur Springs et al v. Sam Stoyanoff (1964) 143 Mont 434, 390 P 2d 448 10

Gaer v. Bank of Baker (1942) 113 Mont 116, 122 P 2d 828 9

Gospel Army v. City of Los Angeles (1946) 331 US 543, 91 L ed 1662, 67 S Ct 1428 11

Hughes v. Superior Court of California (1949) 339 US 460, 94 L ed 985, 70 S Ct 718 12

In Re Anderson's Estate (1942) 113 Mont 125, 122 P 2d 832 9

In Re Stoian's Estate (1960) 138 Mont 384, 357 P 2d 41 10

Kieshik v. St. Nicholas Cathedral of Russian Orthodox Church (1960) 363 US 190, 4 L ed 2d 1140, 80 S Ct 1037 12

Lewis v. Pennsylvania R. Co. (1908) 220 Pa, 317, 69 A 821 13

Libin v. Huffine (1950) 124 Mont 361, 224 P 2d 144 ..... 9, 10

Little v. Little (1953) 127 Mont 152, 259 P 2d 343 9

Mapp v. Ohio (1961) 367 US 643, 6 L ed 2d 1081, 81 S Ct 1684 12

McCreery v. Libby-Owens-Ford Glass Co. (1936) 363 Ill 321, 2 NE 2d 290 12

Neary v. Northern P. Ry Co. (1910) 41 Mont 480, 110 P 226. 9

Phelps v. Great Northern Ry. Co. (1924) 71 Mont 56, 227 P 65. 9

Richfield Oil Corp. v. State Board of Equalization (1946) 329 US 69, 91 L ed 80, 67 S Ct 156 11

Rochin v. California (1951) 342 US 165, 96 L ed 183, 72 S Ct 205 12

State ex rel Great Northern Ry. Co. v. State Board of Equalization (1952) 126 Mont 187, 246 P 2d 220 9

Union Bridge Co. v. United States (1906) 204 US 364, 51 L ed 523, 27 S Ct 367 12

Wiley v. City Commission of Grand Rapids (1940) 293 Mich 571, 292 NW 668 13

Wolf v. Colorado (1948) 338 US 25, 93 L ed 1782, 69 S Ct 1359 11

IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. _____

DONALD R. McGEE,

Petitioner,

—v.—

BURLINGTON NORTHERN, INC., a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

Petitioner Donald R. McGee prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Montana entered on August 18, 1975, in the proceeding entitled *Donald R. McGee, Plaintiff and Respondent, vs. Burlington Northern, Inc., a corporation, Defendant and Appellant,* Docket No. 12796.

On September 12, 1975, a Petition for Rehearing was denied.

CITATION TO OPINIONS BELOW

The opinion of the Supreme Court of Montana is not yet reported, but the slip opinion is printed in Appendix "A" attached hereto.

JURISDICTION

The judgment of the Supreme Court of the State of Montana sought to be reviewed was entered on August 18, 1975, and a Petition for Rehearing was denied on September 12, 1975. The jurisdiction of this Court is invoked under Title 28, USC Sec. 1257 (3).

QUESTION PRESENTED

This petition presents the question of whether the rights of the petitioner under the due process clause of the Fourteenth Amendment to the United States Constitution were violated in this Federal Employees Liability Act case by the readjudication of a final order of the Montana Supreme Court based on its contention that that order was in part in error.

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is the due process clause of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

Petitioner McGee was employed by respondent Burlington Northern as a brakeman on a railroad switching crew spotting boxcars at night in an unlighted area when struck from behind and seriously injured by an iron handle protruding from an open plug door of a boxcar left open in violation of company rules. McGee filed this FELA action and after full discovery, including depositions of all crew members and persons who could

have knowledge of liability of Burlington Northern or possible contributory negligence of McGee, McGee moved the District Court for partial summary judgment on issues of liability and contributory negligence which motion was granted by the District Court as a matter of law after briefs submitted and oral arguments had.

Thereafter, in an original proceeding to the Supreme Court of Montana, Burlington Northern applied for a writ of supervisory control to inquire into the District Court order granting said partial summary judgment. The Montana Supreme Court accepted jurisdiction and ordered the District Court to withdraw its order granting partial summary judgment and enter an order denying same or appear before it to show cause why said motion for partial summary judgment should not be denied and stayed all proceedings of District Court. This order is printed in Appendix "B" attached hereto.

McGee concurred with Burlington Northern that the Montana Supreme Court should determine issues of liability and contributory negligence at that time as Burlington Northern had no appeal or speedy remedy from the District Court order. The entire record was submitted to the Montana Supreme Court, the issues exhaustively briefed and orally argued, following which the Montana Supreme Court under date of January 21, 1974, ordered case tried on issue of damages only with questions of liability and contributory negligence summarily disposed of pursuant to original District Court order. This order is printed in Appendix "C" attached hereto.

After jury trial on issue of damages only and verdict had and judgment entered in favor of McGee, Burlington Northern appealed judgment to the Montana Supreme Court on various specifications of error including one

that it should have a new trial where jury could consider the previously determined issue of contributory negligence. The Montana Supreme Court then ordered a new trial on the sole grounds that the jury should consider the issue of contributory negligence even though it had previously entered its judgment in accordance with the District Court order that as a matter of law McGee was not negligent and contributory negligence was not to be considered by the jury in the trial of this cause. The case is before the Court on a Petition for Writ of Certiorari from that order which is printed in Appendix "A" attached hereto.

FACTS

In its petition to the Montana Supreme Court at the time Burlington Northern asked that Court to exercise supervisory control over the District Court, the Burlington Northern urged that it was faced with the problem of the time and expense involved in a jury trial on damage issues only and then it would have to appeal the District Court judgment on the damage issues and also raise all of the points which were raised in that petition in connection with the negligence and contributory negligence issues. Burlington Northern asked that the issues of Negligence and contributory negligence then be decided as otherwise undue hardship would be imposed upon it and it would not have an adequate remedy by being forced to go to trial without first having the Montana Supreme Court review or determine the correctness of the District Court's order granting partial summary judgment in favor of McGee on those issues.

In his brief answering the petition and brief of Burlington Northern, McGee stated at the very outset thereof:

> "The District Court granted plaintiff's motion for partial summary judgment leaving only the amount of damages to be determined by the jury. Defendant applied to this Court for an appropriate writ which was granted and this matter is set for hearing before this Court at 9:30 a.m. on the 16th day of January, 1974.
>
> "In its Application for Writ and Memorandum of Authorities, defendant spent some time justifying this procedure. Let it be clearly understood that counsel for plaintiff completely approve of the procedure followed by the defendant and desire to thank and commend this Court for liberally applying Writs of Supervisory Control as there is no question but that this saves litigants and their attorneys a great deal of time, money and uncertainty. This is most important when demands for time and money continually increase and every procedure that can be utilized in a speedy determination of lawsuits certainly should be. This, incidentally, is the very reason that plaintiff moved for Summary Judgment and the District Court granted the same."

Both in the briefs and oral argument to the Montana Supreme Court the parties concerned themselves totally with whether the District Court was correct in granting summary judgment on the issues of liability and contributory negligence as a matter of law and only after having been completely advised on every aspect of these issues did the Montana Supreme Court hand down its judgment set forth in Appendix "C".

During the trial of this FELA case the District Court and the litigants relied upon said judgment of the Montana Supreme Court and the case was tried solely on

the question of the amount of damages sustained by McGee as a result of the injuries received while employed by Burlington Northern. Neither party presented any evidence on the previously determined issues of liability and contributory negligence, although Burlington Northern made numerous motions "to protect the record" all of which were denied by the District Court in reliance upon the judgment of the Montana Supreme Court.

On motion for new trial following the jury verdict and on appeal from the order denying same, the Burlington Northern set forth numerous claimed specifications of error, including its position that the questions of liability and contributory negligence should have been presented to the jury. These issues having previously been determined by the District Court and the Montana Supreme Court adversely to the position of Burlington Northern, McGee addressed himself to the other specifications of error which had not previously been adjudicated by the Montana Supreme Court. At the time set for oral argument on appeal, however, Burlington Northern abandoned its other claimed specifications of error and devoted its argument again to the issues of negligence and contributory negligence already considered and determined by the Montana Supreme Court adversely to it.

The Montana Supreme Court, with no new or additional facts before it, reversed its previous judgment as printed in Appendix "C" and which judgment became the law of the case in January, 1974, by its new order and opinion of August 18, 1975, printed in Appendix "A" which the Court is asked to review. Thus McGee found his established rights violated for the first time after the court's decision of August 18, 1975, and could

raise the constitutional issue here involved only in his Petition for Rehearing which he did and in which Petition he gave the same reasons for granting it and cited the same cases in support thereof as are given in support of this Petition for Writ of Certiorari. This Petition for Rehearing was denied by order of the Supreme Court on the 12th day of September, 1975 (D-1).

Following the jury verdict and entry of judgment against Burlington Northern on April 4, 1974, Burlington Northern elected not to post a supersedeas bond on appeal to stay execution of the judgment and McGee, therefore, opted to execute on assets of Burlington Northern in order to satisfy said judgment. After McGee had satisfied a part of the judgment, Burlington Northern, in another original proceeding to the Montana Supreme Court, obtained an order staying further satisfaction of the judgment and allowed Burlington Northern to then post a supersedeas bond which it did in an amount greatly in excess of that which was necessary and Burlington Northern has now brought action against McGee, not only for the return of the money obtained by him in partial satisfaction of his judgment, but also for its costs on appeal, including the cost of the supersedeas bond, which costs total $13,489.75. McGee has been unable to work since receiving his injuries on November 4, 1971, and except for loans which he has had to repay, the only money he has received since the date of accident has been that money obtained by execution as aforesaid.

REASONS FOR GRANTING THE WRIT

I. The order of the Montana Supreme Court dated January 21, 1974, printed in Appendix "C" fully adjudicated the issue of contributory negligence, con-

trolled the course of the jury trial on the issue of damages, became the law of the case and was not subject to further review by the Montana Supreme Court.

II. McGee is entitled to the benefits of the jury verdict and judgment of April 4, 1974, and the attempt of the Montana Supreme Court to deprive him thereof is a violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

ARGUMENT

The dissenting justices recognized the departure from the long, well established and fundamental law of Montana and clearly pointed out the issue here at the outset by stating:

> "A very serious and, therefore, the principal problem presented by the majority opinion is the readjudication of the final order of this Court based on the contention that the order was in part in error. If it were conceded the order resulting from the show cause hearing was totally in error, that would not be grounds for a second review on appeal of a trial on damages. This strikes at the very foundation of our judicial system." (A9).

The majority opinion of the Montana Court vacated the verdict of the jury on the sole grounds that Burlington Northern should have been permitted to introduce evidence relating to McGee's alleged contributory negligence in reduction of damages (A7). This matter having previously been decided by the same Court and no new grounds being found to vacate the judgment of the jury,

that judgment was final and McGee has a very real and perhaps vested interest in it.

Law Of Montana

The Montana Supreme Court has held repeatedly for 102 years, with no exceptions or deviation therefrom, that once the Supreme Court has laid down the law governing a case, it must be followed, even though the decision be erroneous, that the law of the case must be adhered to throughout its subsequent progress both in the trial court and upon subsequent appeals a litigant has no right as against the same adversary to have a question either of law or fact relating to the same cause of action twice adjudicated in the same court or another court of like jurisdiction and that it is an inflexible rule that a decision of the Montana Supreme Court, whether right or wrong, is binding alike on the parties and the courts in the same action and must be adhered to both in the trial court and upon subsequent appeal even though upon subsequent consideration by the Supreme Court it may clearly be of the opinion that the former decision was erroneous. *Creighton v. Herschfield* (1874), 2 Mont 169; *Barkley v. Tieleke* (1876), 2 Mont 433; *Davenport v. Kleinschmidt* (1889), 8 Mont 467, 20 P 823; *Dunseth v. Butte Electric Ry. Co.*, (1910), 41 Mont 14, 108 P 567; *Neary v. Northern P. Ry. Co.* (1910), 41 Mont 480, 110 P 226; *Phelps v. Great Northern Ry. Co.* (1924), 71 Mont 56, 227 P 65; *Carlson v. Northern P. Ry. Co.* (1929, 86 Mont 78, 281 P 913; *Gaer v. Bank of Baker* (1942), 113 Mont 116, 122 P 2d 828; *In Re Anderson's Estate* (1942), 113 Mont 125, 122 P 2d 832; *Libin v. Huffine* (1950), 124 Mont 361, 224 P 2d 144; *State ex rel Great Northern Ry. Co. v. State Board of Equalization* (1952), 126 Mont 187, 246 P 2d 220; *Little v. Little* (1953), 127 Mont 152, 259 P

2d 343; *In Re Stoian's Estate* (1960), 138 Mont 384, 357 P 2d 41; *First National Bank of White Sulphur Springs et al v. Sam Stoyanoff* (1964), 143 Mont 434, 390 P 2d 448.

In this case, the District Court's order granting partial summary judgment which eliminated contributory negligence as a factor was not an appealable order and thus Burlington Northern had to approach the Montana Supreme Court by way of an original proceeding asking it to exercise supervisory control. The Montana Supreme Court did exercise jurisdiction, stayed all proceedings in the District Court and after considering the pleadings, briefs, arguments and being fully advised, ordered the relief sought by Burlington Northern denied, ordered the proceeding dismissed and revoked its stay order. The Montana Supreme Court did the same in the case of *Libin v. Huffine* (1950), 124 Mont 361, 224 P 2d 144, on an appealable order which came before the Court on a motion to dismiss the appeal for the reason that an appeal previously taken by the same parties from the same judgment was dismissed by order of the Montana Supreme Court and that such order is now res judicata. The Montana Court held that the order of dismissal was absolute in its terms and was in effect an affirmance of the District Court's order sustaining the defendant's demurrer and also an affirmance of the judgment of dismissal previously entered in the District Court.

Regardless of any strained interpretation one might desire to place upon the order of the Montana Supreme Court dated January 21, 1974, as printed in Appendix "C", this is precisely what the Montana Court did in the instant matter and it cannot, without violating constitutional rights, the doctrine of the law of the case and the orderly administration of justice, do one thing and say another.

Due Process Denied

This Court held in *Gospel Army v. City of Los Angeles* (1946), 331 US 543, 91 L ed 1662, 67 S Ct 1428, that where the record shows that an order of the Appellate Court has in fact fully adjudicated rights, that adjudication is not subject to further review by State Court. In Gospel Army, this Court discussed *Richfield Oil Corp. v. State Board of Equalization* (1946), 329 US 69, 91 L ed 80, 67 S Ct 156, where this Court said that despite the fact that the Supreme Court of California had reversed a judgment without direction, this Court determined on the entire record and upon an independent investigation of California law that the judgment was final for purposes of Section 237. In that case, the opinion stated:

> "Since the facts have been stipulated and the Supreme Court of California has passed on the issues which control the litigation, we take it that there is nothing more to be decided."

Here the facts were not stipulated to, but it was agreed between the parties that the Supreme Court of Montana should fully determine the issue of contributory negligence at the hearing had before it in January, 1974, and the Montana Supreme Court did in fact at that time adjudicate the issues which controlled the litigation and even though now it may feel that it erred, nevertheless its order of January, 1974, is final, controlling, and not subject to further adjudication.

This Court has also and forcibly stated that due process reflects the concept of ordered liberty and administration of the law and that which constitutes a denial of fundamental fairness, shocking to the universal sense of justice, is violative of due process. *Wolf v. Colo-*

rado (1948), 388 US 25, 93 L ed 1782, 69 S Ct 1359; *Mapp v. Ohio* (1961), 367 US 643, 6 L ed 2d 1081, 81 S Ct 1684.

Although most of the cases dealing with due process are concerned with legislative enactment, there is no power in the judicial department of government to do that which the legislature may not and the requirements of due process of law extend to every case and to every exercise of governmental power. A state may not, judicially or otherwise, disregard the constitutional prohibition. The very contours of due process do not leave judges at large, and they may not draw on their merely personal and private notions and disregard the limits that bind them in their judicial function. Due process is compounded of history, reason and the past course of decisions. *Rochin v. California* (1951), 342 US 165, 96 L ed 183, 72 S Ct 205; *Cafeteria and Restaurant Workers Union v. McElroy* (1961), 367 US 886, 6 L ed 2d 1230, 81 S Ct 1743; *Dent v. West Virginia* (1888), 129 US 114, 32 L ed 623, 9 S Ct 231; *McCreery v. Libby-Owens-Ford Glass Co.* (1936), 363 Ill 321, 2 NE 2d 290; *Union Bridge Co. v. United States* (1906), 204, US 364, 51 L ed 523, 27 S Ct 367.

The Fourteenth Amendment is a restraint, not only on the legislative and executive, but also the judicial departments of the state and it is immaterial whether the state has acted solely through its judicial branch. *Buchalter v. New York* (1943), 319 US 427, 87 L ed 1492, 63 S Ct 1129; *Hughes v. Superior Court of California* (1949), 339 US 460, 94 L ed 985, 70 S Ct 718; *Keishik v. St. Nicholas Cathedral of Russian Orthodox Church* (1960), 363 US 190, 4 L ed 2d 1140, 80 S Ct 1037.

Some courts have held, and properly so, that under

these circumstances McGee now has a vested interest in the judgment of April 4, 1974, and that under the Fourteenth Amendment to the Constitution of the United States, a litigant cannot be deprived of these vested rights. *Wiley v. City Commission of Grand Rapids* (1940), 293 Mich 571, 292 NW 668; *Lewis v. Pennsylvania R. Co.* (1908), 220 Pa 317, 69 A 821.

CONCLUSION

If the judgment of the Montana Supreme Court is allowed to stand the damage to the judicial system, at least in Montana, would be immeasurable. The Petition for Certiorari should be granted.

Respectfully submitted,

JOHN C. HOYT
Attorney for Petitioner
320 First Avenue North
Great Falls, Montana 59401

APPENDIX "A"

ORDER AND OPINION OF THE

MONTANA SUPREME COURT

DATED AUGUST 18, 1975

No. 12796

IN THE SUPREME COURT OF THE

STATE OF MONTANA

1975

DONALD R. McGEE

Plaintiff and Respondent,

—v.—

BURLINGTON NORTHERN, INC., a corporation,

Defendant and Appellant.

Appeal from:

District Court of the Eighth Judicial District,
Honorable Paul G. Hatfield, Judge presiding.

Counsel of Record:

For Appellant:

Gough, Booth, Shanahan and Johnson, Helena, Montana

Cordell Johnson argued and Ronald F. Waterman argued, Helena, Montana

For Respondent:

Hoyt and Bottomly, Great Falls, Montana

John C. Hoyt argued, Great Falls, Montana

Submitted: January 14, 1975

Decided: August 18, 1975

Filed: August 18, 1975

ss/Thomas J. Kearney, *Clerk*

Mr. Justice Frank I. Haswell delivered the Opinion of the Court.

This is an action for damages under the Federal Employers' Liability Act. Plaintiff brakeman sued defendant railroad for injuries he received in a switching accident. The district Court, Cascade County, granted plaintiff a partial summary judgment on the issue of liability. The issue of the amount of plaintiff's damages was tried to a jury which returned an 8 to 4 verdict for $525,000. Following entry of judgment thereon and denial of defendant's motion for a new trial, defendant appeals.

Plaintiff is Donald R. McGee, a 44 year old railroad employee with about 20 years experience. Defendant is Burlington Northern Inc., a railroad corporation, which was plaintiff's employer.

The accident forming the basis of this litigation occurred in the railroad yards at Omak, Washington on November 4, 1971 at about 5:45 p.m. Plaintiff, a swing brakeman on a switching crew, was struck from behind by an iron door handle protruding downward and outward from the door of a moving boxcar.

There were no eyewitnesses to the accident. It was dark and switching was being done by lantern. The switch crew consisted of the engineer, the conductor, the head brakeman, the flagman and the swing brakeman (plaintiff). The conductor was not present at the accident site as he was checking a car of fruit in another part of the yard.

Shortly before the accident, the switch engine was on the main line facing east. A boxcar was coupled to the front of the engine with a chip car coupled directly to the boxcar. The switch engine pushed the two cars east along the main line. As the three neared a passing track

leading off the main line, plaintiff uncoupled the chip car which was "kicked" upgrade along the main line to a point where the flagman "chopped" the wheels to prevent it from rolling back down the grade. After "kicking" the chip car up the main line, the switch engine and boxcar came to a stop on the main line with the forward trucks or wheels of the boxcar resting on the switch points of the passing track.

At this point the engineer was in his cab on the south side of the main line; he was facing east. The head brakeman was at the switch box on the north side of the main line. Plaintiff was about ten feet away from the head brakeman and had him in full view. The flagman was some distance away near the chip car.

According to plaintiff, he told the head brakeman that the switch engine and boxcar were going to be moved onto the passing track and the head brakeman acknowledged this verbally. The head brakeman denies plaintiff said anything to him concerning where the boxcar would be "kicked," but he was aware it would go on one of the inside tracks rather than the main line. However, he could not throw the switch because the boxcar "was sitting right on the switch."

Again, according to plaintiff, he started walking east along the south side of the main line and called to the flagman, "We are going to pull the pass." The flagman gave a "come ahead" signal with his lantern, which plaintiff repeated to the engineer. The flagman confirmed plaintiff's statement to him and indicated that he acknowledged the message by pointing his lantern at plaintiff. He denies giving a "come ahead" signal. At this time, the flagman was walking down the passing track on the north side of the main line out of sight of the engineer.

In any event, the engine with boxcar in front moved east down the main line. The protruding door handle of the boxcar struck plaintiff from behind causing his injuries.

Plaintiff filed this action in the district court of Cascade County on February 21, 1973, under the Federal Employers' Liability Act and the Federal Safety Appliance Act claiming damages of $736,000. Defendant's answer denied any negligence on the part of the railroad and pleaded the partial affirmative defense of contributory negligence. Extensive pretrial discovery was pursued by both parties consisting principally of interrogatories and answers, demands for production of documents, requests for admissions and responses, and numerous depositions.

Plaintiff moved for a partial summary judgment on the issue of liability. The district Court granted plaintiff a partial summary judgment on the issue of liability under the Federal Employers' Liability Act. The district court deemed it unnecessary to rule on plaintiff's claim of violation of the Federal Safety Appliance Act.

In its order, the district court specifically stated there were no genuine issues of material fact, that defendant's negligence was established as a matter of law, and that the record disclosed no negligence on the part of plaintiff which in any way contributed to his injuries. The order specified that the uncontroverted facts established defendant's violation of its own rules requiring the boxcar door to be closed before the switching operation was ever commenced in which event the handle would not have protruded outward in the manner it did and plaintiff would not have been struck and injured.

Defendant then applied to this Court for supervisory control, seeking review and reversal of the district

court's order. This Court accepted jurisdiction and issued an alternative writ ordering the district court (1) to enter "an order denying partial summary judgment", or (2) to appear and show cause "why said motion for partial summary judgment would not be denied."

After oral argument, written briefs, and hearing, we denied defendant's application in this operative language:

> "IT IS ORDERED that the relief sought be, and it hereby is, denied, and this proceeding is ordered dismissed, and our stay order is revoked."

Thereafter a jury trial was held in the district court limited to the issue of damages sustained by plaintiff. Prior to and during trial, defendant sought to reopen the issue of liability which it supported by offers of proof, all of which were denied. The jury returned a verdict for plaintiff in the amount of $525,000 and judgment was entered thereon. The district court denied defendant's motion for a new trial. Defendant appeals from the judgment.

Defendant assigns 21 issues for review. The claimed errors can be summarized: (1) denial of defendant's motion for a new trial; (2) awarding plaintiff a partial summary judgment on the issue of liability and limiting the jury trial to the amount of damages sustained by plaintiff; (3) admission of inadmissible evidence; (4) an excessive verdict based on passion and prejudice; (5) error in jury instructions; (6) prejudicial conduct by plaintiff's counsel and the presiding judge; (7) improper rebuttal testimony; and (8) denying defendant a pretrial examination of plaintiff for rehabilitation purposes. The principal errors claimed are the first four.

We find that we must grant defendant a new trial on

the basis of errors in law that occurred prior to and at the trial. These errors of law consisted principally of the exclusion of evidence relating to defendant's partial affirmative defense of contributory negligence.

At the outset, we hold the district court's order granting partial summary judgment was correct to the extent of its ruling that the negligence of defendant was established as a matter of law on the record before it.

Defendant disputes this holding. It argues the record discloses many genuine issues of material fact, principally just what did happen in the railroad yard at Omak at the time of the accident and specifically whether plaintiff was struck by the boxcar itself or the protruding door handle. Defendant contends the position of plaintiff after the accident, in relation to the boxcar, is as equally consistent with his being struck by the boxcar itself as by the protruding door handle. Therefore, defendant argues, the district court had to weigh the evidence, draw inferences therefrom, and assume the role of trier of the facts in order to conclude that plaintiff was struck by the protruding door handle and defendant's negligence was thereby established.

The record before the district court belies this contention. The following uncontroverted evidence was before the district court: (1) plaintiff's deposition testimony that he was hit by the protruding door handle; (2) the accident report phoned to the railroad's Wenatchee office within a half hour after the accident and subsequently reduced to writing, states that plaintiff was struck by the protruding door handle; and (3) the railroad's own operating rules require all doors to be closed before moving the boxcar. No factual inferences were required to establish that plaintiff was hit by the protruding door handle in violation of defendant's own operating rules.

Defendant's contention that the facts of the accident are equally consistent with plaintiff's being struck by the boxcar itself rests on supposition and conjecture not contained in the evidence before the court.

However, the record before the district court at the time it granted partial summary judgment disclosed several genuine issues of material fact relating to defendant's claim of contributory negligence by plaintiff. Without attempting to set forth an exhaustive or all-inclusive list of such issues, we note these: (a) Should plaintiff in the exercise of ordinary care have seen the protruding door handle and corrected it prior to the accident? (b) Should plaintiff in the exercise of ordinary care have seen that the front trucks or wheels of the boxcar were on the switch points requiring the engine and boxcar to be backed up, so the switch could be thrown directing the boxcar onto the passing track? (c) Did plaintiff himself initiate the "come ahead" signal to the engineer or was he simply relaying such signal from the flagman? (d) Was plaintiff himself guilty of violation of the railroad's operating rules? (e) Did plaintiff himself conform to reasonable standards of conduct under the circumstances?

The existence of these genuine issues of material fact in the record before the district court precluded a finding or recital by the district court that "the record discloses no negligence on the part of the plaintiff which in any way contributed to his injuries." In this respect the district court's order was in error.

In Federal Employers' Liability Act cases contributory negligence on the part of plaintiff does not bar his claim, but simply reduces his recovery in proportion to his own contributing fault. The controlling statute provides that in all actions to recover damages under the Federal

Employers' Liability Act "the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee * * *." 45 U.S.C.A. §53.

In the instant case, defendant was denied the right to introduce evidence on the issue of plaintiff's alleged contributory negligence in diminution of damages. (We acknowledge error in our order dismissing defendant's application for supervisory control in failing to strike the summary finding or recital in the district court's order that the record disclosed no negligence on the part of plaintiff contributing to his injuries.) Perhaps this misled the district court in its subsequent rulings. In any event, the fact remains that defendant should have been permitted to introduce evidence relating to plaintiff's alleged contributory negligence in reduction of damages. The prejudicial and reversible nature of the error is obvious.

On this basis, the judgment herein is vacated and set aside. A new trial is granted limited to the amount of damages that should be awarded plaintiff. At such trial defendant shall be permitted to introduce relevant, competent, and admissible evidence in support of its partial affirmative defense of contributory negligence.

This ruling renders consideration of most of the other issues on appeal unnecessary. They simply involve various alleged errors that occurred at the trial assigned as additional and independent grounds for granting a new trial.

The only remaining issue likely to recur on retrial is whether defendant should be permitted to have a pretrial examination of plaintiff for rehabilitation purposes. It is clear the district court's order denying such examination

was based, in part at least, on these considerations: (1) the repeated delay of defendant in advising the court of the purposes of the examination, the nature of the tests to be administered, who would perform the tests, where and when they would be conducted, and similar relevant information, (2) the conflicting representations to the court as to whether psychological testing would be involved, (3) the repeated continuances in hearing defendant's motion occasioned thereby, and (4) defendant's motion as presented was not in such form or with such particularity that plaintiff could make proper objections or concurrences.

We agree with the previous ruling of the district court based on the foregoing considerations. The broad question of whether defendant is entitled to pretrial discovery of plaintiff's vocational rehabilitation potential by means of aptitude or psychological testing is not fairly presented by the record before us. Only if and when a timely, sufficient and proper motion is presented to the district court will such issue be reached. We decline to rule on this broad question in a factual vacuum.

The judgment of the district court is vacated and set aside. A new trial is ordered on the issue of the amount of damages to be awarded plaintiff, for the reasons and under the guidelines set forth herein.

FRANK I. HASWELL, Justice

We Concur:
JAMES T. HARRISON, Chief Justice
WESLEY CASTLES, Justice

Mr. Justice Gene B. Daly dissenting:

I dissent.

A very serious and therefore the principal problem presented by the majority opinion is the readjudication of a final order of this Court based on the contention that that order was in part in error. If it were conceded the order resulting from the show cause hearing was totally in error, that would not be grounds for a second review on appeal of a trial on damages. This strikes at the very foundation of our judicial system. As alluded to in the majority opinion, the district court granted a partial summary judgment on the issue of liability and contributory negligence in this cause and at that time defendant had the option to (1) go to trial under the district court order and try the cause on damages, as the summary judgment was not appealable, and handle the issue in the regular course of appeal, or (2) ask this Court to exercise its jurisdiction and hear the matter at that time on a petition for supervisory control. Defendant chose the latter course. Supreme Court Case No. 12660, the application for relief, petitioned:

> "That the Order granting summary judgment *is not an appealable order,* and unless the District Court is ordered and directed by a proper writ or order of this Court, the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, and the Honorable Paul G. Hatfield, District Judge thereof, Respondents herein, will proceed to try the damage issues in the case of 'Donald R. McGee, Plaintiff, vs. Burlington Northern, Inc., Defendant' being Civil Action No. 75920C in said District Court; *and that an appeal from a final judgment in that action would impose*

undue hardship on Relator and be wholly inadequate as a remedy for the reason that Relator would be forced to go to trial on the damage issues with its liability already established in a Federal Employers' Liability Act case which applies a rule of comparative negligence in connection with the affirmative defense of contributory negligence, and for that reason *the remedy afforded by appeal would not be adequate* in a case such as this where the comparative negligence theory is the applicable rule of law." (Emphasis supplied.)

Petitioner prayed for an appropriate writ directed to respondent district court to withdraw its order dated November 30, 1973, granting partial summary judgment and that an order be entered denying plaintiff's motion for partial summary judgment in its entirety or in the alternative to appear and show cause why it has not done so. Further, that upon a *hearing* this Court *find and adjudicate* that the motion for summary judgment *should not have been granted.*

On December 17, 1973, this Court assumed jurisdiction in the matter and directed this order to the district court:

"The Court is in receipt of an Application for Writ of Supervisory Control or other appropriate writ to inquire into an Order entered in Civil No. 75920C, in the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, which said Order granted a partial summary judgment against Relator; counsel for Petitioner and Relator was heard ex parte and the matter taken under advisement.

"IT IS ORDERED that Respondents shall with-

> draw the order of November 30, 1973, granting partial summary judgment and shall enter an Order denying partial summary judgment in the case of 'Donald R. McGee, Plaintiff, -vs.- Burlington Northern, Inc., a corporation, Defendant', being No. 75920C, in the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, or, *alternatively, to be and appear before this Court at the hour of 9:30 A.M., on the 16th day of January, 1974, to show cause why said motion for partial summary judgment should not be denied.* * * *" (Emphasis supplied).

Thereafter briefs were filed by defendant and plaintiff in the district court action. The briefs were exhaustive on the issues presented to the district court in support of and in opposition to plaintiff's motion for partial summary judgment. All the depositions of all the witnesses had been taken and were referred to in the briefs. All of the discovery proceedings had been completed and were referred to in the briefs.

Plaintiff McGee's brief in Cause No. 12660, stated at the outset:

> "The District Court granted plaintiff's motion for partial summary judgment leaving only the amount of damages to be determined by the jury. Defendant applied to this Court for an appropriate writ which was granted and this matter is set for hearing before this Court at 9:30 a.m. on the 16th day of January, 1974.
>
> "In its Application for Writ and Memorandum of Authorities defendant spent some time justifying this procedure. *Let it be clearly understood that counsel for plaintiff completely approve of the pro-*

cedure followed by the defendant and desire to thank and commend this Court for liberally applying Writ of Supervisory Control as there is no question but that this saves litigants and their attorneys a great deal of time, money and uncertainty. * * *"

A full hearing on all issues was had by the Court on January 16, 1974 and the matter taken under advisement. After a complete examination of the record this Court found no quarrel with the partial summary judgment entered by the trial court and so stated in its order dated January 21, 1974, which in effect permitted the trial to proceed on damages and terminated the issue of liability and contributory negligence:

"ORDER

"PER CURIAM:

"This is an original proceeding wherein Relator sought an appropriate writ to reverse an order granting a partial summary judgment entered in Civil No. 75920C, in the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, in an action entitled Donald R. McGee, Plaintiff, vs. Burlington Northern, Inc., a corporation, Defendant, pending in said Court.

"Counsel for Relator was heard ex parte, an order to show cause issued, all proceedings stayed in the District Court until further order.

"Upon the return day oral argument was had and briefs filed and the matter was taken under advisement.

"The Court having now considered the pleadings, briefs, and argument, and being advised,

> "*IT IS ORDERED that the relief sought be, and it hereby is, denied,* and this proceeding is ordered dismissed, and our stay order is revoked." (Emphasis supplied.)

Here, defendant argues that this Court's January 21, 1974, order, as a result of the procedures just related, could only mean that we felt defendant had an adequate remedy at law and it would not be *proper* to issue a writ of supervisory control and based its contention on the fact that we did not state the grounds for the decision in the order. For authority defendant miscited Schultz v. Adams, 161 Mont. 463, 507 P 2d 530. *Schultz* was an attempt to *appeal* a district court order for partial summary judgment and the Chief Justice clearly stated that the controlling issue in *Schultz* was whether the order was an appealable order. There the contention was that the order was final and appealable at the district court level. All the language about "interlocutory order" and review on appeal is correct under those facts, but if a litigant feels as strongly as the defendant did here about the effect of the order and persuades this Court to review that order under supervisory control and this is done, the order of this Court, particularly if it affirmed the district court, is a final order and not subject to review again.

Considering the process as a whole, for a minute or two, it becomes apparent on its face and to adopt the rationale of the defendant would be self-defeating. It is true we frequently do not take jurisdiction, but in those cases the Court orders an "advisory hearing" and after hearing refuse jurisdiction and dismiss thus leaving the parties where we found them. On the few occasions that this Court has taken jurisdiction and issued an order to show cause and after hearing did not wish to grant relief, as argued by defendant, we plainly stated the writ was

improvidently issued and we did not wish to intervene. The fact still remains that we did order the district court order set aside here, when we issued the writ and gave the district court the alternate choice to come in and justify its order.

Had the district court not selected to appear, the order of this Court would have been binding and the summary judgment of the district court withdrawn. The district court did come in and justify its order and we made an order denying the relief to petitioner-defendant and permitted the district court order to stand, and the court to proceed to trial on the issue of damages. There is no support in the law for a second review after an adjudication on the merits by a court of last resort, in the same jurisdiction.

Therefore, if the majority opinion is allowed to stand as precedent for the proposition that a second review is allowable under these facts, then the bench and the bar would be better served if these kind of proceedings were abandoned. We have no right to review a matter on the merits, dismiss the order against the trial court, permit defendant to proceed, and lead it into error and a new trial by a second review which states we are now convinced we were in error the first time around.

This obviously imposes the same burden on the parties that they both agreed they wished to avoid by a hearing on the merits, under our power of supervisory control at a time before trial. The temporary beneficiary of this kind of precedent is not going to gain in the long view of the matter, as one day the rule surely will be applied against it.

So far as the merits of the argument on contributory negligence are concerned, I am sure we were correct in

our first decision. Defendant raised a number of disputed facts from which, it argued, an inference could be drawn that plaintiff stepped in front of the train and was struck by the freight car. The court has disagreed with this and established the railroad was negligent and operating in violation of its own rules. Now, the majority contends this is a genuine issue of fact on reasonable conduct or care by not seeing the protruding door handle.

First, there is no discussion in any part of the record that would indicate plaintiff had any duty to inspect and the contrary is true. All witnesses deposed placed the duty on various employees who were not employed at that yard. Also, everyone deposed failed to see the protruding hook. Vernon B. Workman passed the door in daylight and failed to see it. When he assisted plaintiff in the dark after the accident he did not see it and bumped his head on the hook. The engineer was coupled on the car and did not see it while looking directly past it. No one even inferred in the record that plaintiff should have seen the hook. In fact, Paluch v. Erie Lackawanna Railroad Company, 387 F. 2d 996, 999 (1968), states:

> "* * * it is not contributory negligence to fail to discover a danger when there is no reason to apprehend one."

See also: Colorado and Southern Railway Co. v. Lombardi, 156 Colo. 488, 400 P. 2d 428 (1965).

Second, all the conversation about the car on the switch point and the dispute with the flagman and the come ahead signal are frivolous. Plaintiff gave the signal and was alongside the train "in the clear" and but for the defendant's negligent open door would not have been struck. There is no evidence that those switching matters contributed to plaintiff's injury. Since 1939, the plea

of contributory negligence is not a defense but a plea to diminish damages. The burden of proof of contributory negligence is on the defendant and includes proof of negligent acts or omissions *and causal effect* of the act or omission on accident and injury. Page v. St. Louis Southwestern Railway Company, 312 F. 2d 84, 98 ALR2d 639, (1963).

Further, this rule is not a mere matter of procedure but of substantive law and applies in state courts where the rule is different. Crugley v. Grand Trunk Ry. Co., 79 N.H. 276, 108 A. 293. Contributory negligence of the employee which remotely, *but not directly* and *proximately* contributes to the injury, that is negligence that is not *causal,* does not operate to reduce damages. Illinois Cent. R. Co. v. Porter, 207 F. 311.

Third, the violation of operating rules by the plaintiff is not well taken. Defendant claimed violation of Rule #712—a general operating rule of the railroad and which applies to all personnel to the effect that *if they see* a hot box, dragging brake, etc., they must report or stop the train - - -. First, there is no duty here unless *you see* a defect and, second, the federal courts have held these general rules to be advisory and not grounds for contributory negligence. A rule to meet the standard of contributory negligence must be directory, that is a rule applicable to plaintiff directly which would create a duty. In the entire record there is no evidence of such a violation. So far as violation of rule "M" for employees, it is another general operating rule, as well, and only provides employees must keep a lookout for movement of trains at any time, and again this has been covered above. There was no evidence to create the issue and plaintiff was in the "clear" and not struck by the train itself.

The last issue raised was reasonable conduct of the plaintiff. Again, there is no evidence in the record that would bear on this issue. If it is urged by defendant under the cases cited, defendant must set forth the conduct and its causal connection to the accident and injury. This has never appeared in the record.

For the above reasons the judgment of the district court should be affirmed.

GENE B. DALY, Justice

Mr. Justice John Conway Harrison dissenting:

I concur in the foregoing dissent of Mr. Justice Gene B. Daly.

JOHN CONWAY HARRISON, Justice

APPENDIX "B"
ORDER TO SHOW CAUSE OF
MONTANA SUPREME COURT
DATED DECEMBER 17, 1973

IN THE SUPREME COURT
OF THE
STATE OF MONTANA

STATE OF MONTANA ex rel.
BURLINGTON NORTHERN INC.,

Relator,

THE DISTRICT COURT OF THE
EIGHTH JUDICIAL DISTRICT OF
THE STATE OF MONTANA, IN AND
FOR THE COUNTY OF CASCADE,
THE HONORABLE PAUL G. HATFIELD,
JUDGE PRESIDING,

Respondents.

ORDER

The Court is in receipt of an Application for Writ of Supervisory Control or other appropriate writ to inquire into an Order entered in Civil No. 75920C, in the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, which said Order granted a partial summary judgment against Relator; counsel for Petitioner and Relator was heard ex parte and the matter taken under advisement.

IT IS ORDERED that Respondents shall withdraw the Order of November 30, 1973, granting partial summary judgment and shall enter an Order denying partial summary judgment in the case of "Donald R. McGee, Plaintiff, —vs— Burlington Northern Inc., a corporation, Defendant", being No. 75920C, in the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, or, alternatively, to be

and appear before this Court at the hour of 9:30 A.M., on the 16th day of January, 1974, to show cause why said motion for partial summary judgment should not be denied.

IT IS FURTHER ORDERED that all further proceedings in the case of "Donald R. McGee, Plaintiff, —vs— Burlington Northern Inc., a corporation, Defendant", Civil No. 75920C, in the Eighth Judicial District of the State of Montana, in and for the County of Cascade, be stayed until further order of this Court.

AND IT IS FURTHER ORDERED, that counsel for Petitioner and Relator herein shall serve upon counsel for all other parties involved in said cause a copy of the Application and Petition, and a copy of the Memorandum of Authorities as filed by Petitioner and Relator, within 3 days from the date of this Order, and Relator shall likewise serve a copy of this Order at the same time.

DATED this 17th day of December, 1973.

JAMES T. HARRISON, Chief Justice

APPENDIX "C"
ORDER OF MONTANA SUPREME COURT
DATED JANUARY 21, 1974

C-1

IN THE
SUPREME COURT
OF THE
STATE OF MONTANA

No. 12660

STATE OF MONTANA ex rel.
BURLINGTON NORTHERN INC.,

Relator,

vs.

THE DISTRICT COURT OF THE
EIGHTH JUDICIAL DISTRICT OF
THE STATE OF MONTANA, IN AND
FOR THE COUNTY OF CASCADE,
THE HONORABLE PAUL G. HATFIELD,
JUDGE PRESIDING,

Respondents.

ORDER

PER CURIAM:

This is an original proceeding wherein Relator sought an appropriate writ to reverse an order granting a partial summary judgment entered in Civil No. 75920C, in the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, in an action entitled Donald R. McGee, Plaintiff, vs. Burlington Northern Inc., a corporation, Defendant, pending in said court.

Counsel for Relator was heard ex parte, an order to show cause issued, all proceedings stayed in the district court until further order.

Upon the return day oral argument was had and briefs filed and the matter was taken under advisement.

The Court having now considered the pleadings, briefs and argument, and being advised,

IT IS ORDERED that the relief sought be, and it hereby is, denied, and this proceeding is ordered dismissed, and our stay order is revoked.

DATED this 21st day of January, 1974.

APPENDIX "D"
ORDER DENYING PETITION FOR REHEARING

D-1

IN THE
SUPREME COURT
OF THE
STATE OF MONTANA

No. 12796

DONALD R. McGEE,
Plaintiff and Respondent,
vs.
BURLINGTON NORTHERN, INC.,
a corporation,
Defendant and Appellant.

ORDER

PER CURIAM:

IT IS ORDERED that the petition for rehearing in the above named cause is hereby denied.

DATED this 12th day of September, 1975.